estate could be limited to take effect at a period of time later than twenty-one years after the life or lives of any person or persons in being at the death of the testator, but so long as the lives are in existence at the time of the death, any number of them may be included, and the commencement of any specified estate postponed until twenty-one years after the expiration of the last surviving life. These estates differ from contingent remainders in this respect, that being substantive bequests directly to the devisees, their existence cannot be affected by any acts of persons possessing precedent estates. At the time, or upon the contingency designated the estate vests, and cannot be prevented from attaching, although "all mankind should join in the conveyance."[1]

With this imperfect examination of some of the instances in which the doctrines of equity jurisprudence have been admitted and become principles of the common law, we take leave of the subject.

W. E. C.

Concord, N. H.

RECENT AMERICAN DECISIONS.

In the Supreme Court of Ohio—Cleveland District, July Term, 1860.

HENRY HOLMES ET AL. *vs.* THE CLEVELAND, COLUMBUS, AND CINCINNATI RAILROAD ET AL.

1. The complainants claim as owners in equity, in common with others, of a parcel of land in the city of Cleveland, by boundaries designated; which land originally belonged to the stockholders of the Connecticut Land Company, which owned the entire Western Reserve; and that they and their heirs, are the representatives of such stockholders, and that the lands of the reserve were conveyed to trustees for such stockholders; that in 1836 one Thomas Lloyd, fraudulently procured a deed from said trustees conveying the land claimed in this suit, and that the defendants are in possession of said lands, with notice of the trust and fraud. The

[1] 4 Kent, 270; Thelluson *vs.* Woodford, sup.

prayer of the bill is, to set aside said fraudulent deed, dissolve said trust, and have a partition of said land, and account of the rents and profits thereof received by the defendants.

2. The defendants rely for a defence upon the equitable bar furnished by lapse of time, want of title in equity in the complainants, and upon a dedication of said land to the public by the Connecticut Land Company, as early as 1796, accepted immediately thereafter and ever since used in accordance with the purposes of the dedication. They deny that they are in possession under the title derived from said Lloyd, and aver that they are in possession under the authority of a statute of the State of Ohio, in pursuance of a license granted to the city of Cleveland, and using the same in a manner consistent with the original dedication.

Mr. Birchard and *Mr. Mason*, for complainants.

Mr. Vinton and *Mr. Hitchcock*, for defendants.

The opinion of the court was delivered by

McLEAN, J.—The complainants claim in this case to be the owners in equity, in common with others unknown, and too numerous to be made parties, if known, of a parcel of land in the city of Cleveland, bounded north by the dividing line between Lake Erie and Canada and the United States, east by Water street in said city, south by the north line of lot 191, and west by the Cuyahoga river, as it run in the year 1796, and by a line from its mouth parallel with the east line. They also allege that said land originally belonged to the stockholders of the Connecticut Land Company, (which owned the entire Western Reserve,) and that they, and their heirs, are the representatives of such stockholders; and that the lands of the Reserve were conveyed to mere naked trustees for the benefit of such stockholders; that on March 23, 1836, one Thomas Lloyd, fraudulently procured a deed from said trustees, conveying the land claimed in this suit, and that defendants are in possession of said lands, under a title made from said Lloyd, with notice of the trust and fraud.

The prayer of the bill is, to set aside said fraudulent deed, dissolve said trust, and have a partition of said land, and an account of the rents and profits thereof received by the defendants.

The defendants insist, that the title to all of said land covered by the water of Lake Erie is in the public, and not in any trustee

for them; and as to the residue of said land, rely for a defence upon the equitable bar furnished by lapse of time, want of title in equity in the complainants, and upon a dedication of said land to the public by the Connecticut Land Company, as early as 1796, accepted immediately thereafter, and ever since used in accordance with the purposes of the dedication. They deny that they are in possession under the title derived from said Lloyd, and aver that they are in possession under the authority of a statute of the State of Ohio, in pursuance of a license granted by the city of Cleveland, and using the same in a manner consistent with the original dedication.

The leading historical facts of this case, are believed to be accurately and succinctly stated in the defendants' brief. "The Connecticut Land Company was organized in Connecticut in 1795, and became the owner of the Connecticut Western Reserve, and issued to its stockholders certificates of stock for their respective interests therein. This title was made to the State of Connecticut by the United States, under the act of April 20th, 1800, and was vested in trustees for the purpose of partition and conveyance to purchasers. The company caused all its lands east of the Cuyahoga and the Portage Path, to be surveyed into townships in the year 1796, and also selected for sale six townships, including the city plot, which were immediately (except the city plot) surveyed into one hundred acre lots, and the whole put in market.

In the year 1798, by mutual arrangement between the proprietors of said land company, in pursuance of the original association, partition was made of all the company's lands surveyed as aforesaid, except the six townships and the city of Cleveland; and the legal title was secured to the stockholders in severalty. The company, by its agent, continued to control the land in said six townships and the city plot, until December, 1802, when having caused the unsold land thereon to be resurveyed, they in like manner distributed the same among their stockholders, and reserved the legal title to each, and in said partition avowedly included all that remained unsold in said townships and city. In April, 1807, they, in like manner divided all their land west of the Cuyahoga and

the Portage Path. Soon after this, it was discovered that by reason of omission in the surveys, a small piece of land, not connected with the city or the six townships, had been omitted, and this, called surplus land, was surveyed into lots in the city and in the six townships which had been under contract and become forfeited. Whereupon at a meeting of the stockholders of said company, held according to its constitution, at which they were fully represented, on the 4th January, 1809, it was resolved, "that the company divide in severalty among the stockholders, all their property, consisting of notes, contracts, bonds and land, according to their plan of partition previously adopted," and that the partition made should be conclusive upon the proprietors, and "no after allowances claimed on account of any error that may have happened in cost, measure or otherwise. But said division shall be final, unless further property belonging to the company be discovered." The company thereupon proceeded to make the partition and reserve the title to the stockholders in severalty as proposed; and thereupon on the 4th January, 1809, it was voted, "that this meeting be adjourned without day." Up to that time the company kept full records of its proceedings, but since which time there never has been a meeting either of its directors or stockholders up to the commencement of this suit.

The first plot and survey of the city of Cleveland was made in 1796, by Augustus Porter and Seth Peare, who were the authorized surveyors of the Connecticut Land Company; and who superintended the surveys of the entire Reserve, east of said Portage Path. This survey is called Peare's survey, and the original field notes and maps are in evidence. On this map was marked "Bath street," connecting Water street with the river, and bounded north by the lake, and south by lot 191, and varies in width from 80 to 200 feet.

In describing the lots east of Water street, the length of the lines above the bank only are given; but on the map they extend to the lake. In March, 1802, the trustees of said land company conveyed three of said lots, Nos. 1, 2, and 3, lying next east of Water street to Samuel Huntington, bounding them on the north by the lake. This deed also recognized the lake as the north

boundary. And it was also the northern boundary of other lands, and lot 191.

On December 6th, 1800, the Territorial Legislature of Ohio passed an act, entitled an act to provide for the recording of town plots, and in 1801 Turpland Kirtland, being then the agent of the company, undertook to make a plot of said city, to be made, proved, and recorded, as required by that act, the effect of which would be, to vest the streets and other public grounds in trust for the purposes therein expressed.

Amos Spafford, a surveyor, made a survey of the city, which he called field notes, and minutes of the survey of the outlines, lands and squares of the city, for the land company in 1796. Both Peare and Spafford's plots and surveys, Peare being the first one, have been recognized from their origin to the present, by the members of said land company, and the map of Peare was regularly recorded on the proper record for Trumbull county, by the agent of the company. In the year 1833, River street, being nearly parallel with the river, was opened and terminated at Bath street, about 140 feet distant from the river; and thereafter the latter was used as a thoroughfare from Water street to the river and the lake.

In 1827, the United States in improving the harbor, cut a new channel for the mouth of the river, running directly north from a point near the northwest corner of lot 191, and thereby left on the west side of the river, a small portion of Bath street, perhaps one-eighth of an acre. Immediately after the construction of the harbor, the accretion commenced on both sides of the river, and has continued to increase, particularly on the west side, until one-eighth of an acre has increased to seven or eight acres.

After a few years, the accretion so increased as to prevent the washing of the bank, and it ceased to cave at the intersection of Water and Bath streets, and thereupon, about the year 1830, the corporate authorities repaired said streets, and again opened the connection between them, since which time Bath street has been one of the principal thoroughfares of the city.

In 1840, in pursuance of authority given by its charter, the City Council caused the exact boundaries and fronts of all the lanes and

streets of the Cuyahoga river, below Vineyard's Lane, to be surveyed and ascertained, of which survey a report was made August 4th, 1841; which was accepted, and thereby the City Council established the boundaries and fronts of said streets and lanes, according to said survey, which designated the entire territory between lot 191, and the lake at Bath street, and fixed its boundaries accordingly.

On December 21st, 1844, the legislature of Ohio, by statute, authorized the City Council to lease any portion of the streets adjacent to the lake and river needed for public use, as docks and wharves, for a term not exceeding ten years; the rents arising therefrom, to be appropriated to the repairs of the streets and of the public wharves.

February 4th, 1845, a subdivision and plot of the territory called Bath street, east of the river was made, designating for public use certain streets thereon, and also certain lots by number, several of which lots were soon after leased by authority of the City Council, under the limitations stated in said statute, and possession was taken by the tenants. They were used almost exclusively for the storage, sale and shipment of coal. Against these tenants suits in ejectment were commenced, in favor of Lloyd's lessee, which wer defended by the city. Pending these suits, in 1849 or 1850, the railroad companies, or some of those now occupying the land east of the river in pursuance of the authority conferred by the statute under which they were incorporated, finding it necessary, in the location of their roads, to occupy said grounds, instituted the requisite proceedings for appropriating the same.

After the instrument of appropriation was filed, under the authority of the same statute, they agreed with the city upon the terms and manner of occupying the same, for railroad purposes; and also to avoid annoyance from Lloyd and his assigns, in he use of such portions of Bath street as they now require for their roads, purchased out of the asserted claims of said Lloyd or his assigns, and since have expended over $450,000 in improvements upon said land, and in reclaiming the same from the lake by means of piling and filling, and thus the accretion has been greatly extended.

The articles of association did not contemplate a permanent organization of the Connecticut Land Company, but were entered into for the better and more convenient accomplishment of certain necessary and temporary objects, which could not be effected except by a joint action of all the proprietors in some form. These necessary objects, but temporary in their performance, were the extinguishment of the Indian title, the survey of their lands and the partition of them in severalty among the proprietors.

It was the policy and intent of these articles, that this trust should continue until the partition could be had, and no longer; and they directed a survey of the whole territory within the term of two years, and that the trustees should convey the whole in severalty to the purchasers and shareholders.

The parties to the articles of association, viz. the proprietors, the board of directors, and the trustees, proceeded to carry them into execution; the Indian title was extinguished, the country was surveyed, the directors sold so much of the land as they were required to sell, and in January 1809, all things being now ready, the proprietors, at a regular meeting, made a final division in severalty of all their lands; and all outstanding claims for lands sold by the directors, and in a word, all of their common property of which they had any knowledge. The resolution directing the partition declares, that the division then made shall be conclusive upon each proprietor, and that it should be final, unless further property belonging to the company should be discovered. There is no averment in the bill, nor any attempt to prove, that the existence of the land now in dispute was then unknown to the proprietors. This resolution shows, in a very pointed manner, that it was the understanding and intention of the proprietors, that the division then made, should stand as a full, complete, and final execution and accomplishment of the articles of association, and of every and all of its objects, saving only the contingency, of the after discovery of property, then unknown to them; and that such property, if any, as was unknown, and which, because it was regarded by them as worthless, or for any other cause, they did not think it worth dividing, they abandoned or left it to whoever was or might become the occupier or possessor of it.

That the proprietors understood this should be a final dissolution of the company, subject alone to that one contingency, is evident from the fact that the proof shows that, prior to this time, they held regular meetings, and that no meeting of the company was ever held afterwards.

Nearly fifty years have transpired since this association was dissolved. The proof shows that a quarter of a century afterwards, the land referred to was of little or no value. None has been imparted to it by the associates or their descendants. But a very great and permanent value has been given it, by the terminus of the canal from the Ohio river to Lake Erie, and by a large amount of money expended by the United States, and by railroad companies on this land, in improving the harbor of Cleveland, which last has caused it to be made the common termini of five important railroads, which have expended upon it more than half a million of dollars, in erecting depots, freight and passenger houses, wharves, &c., for the benefit and convenience of trade and travel.

This final action on the affairs of the Connecticut Company, must be considered as conclusive. In 1809 the town was limited, and its business prospects were small. It was deemed a proper time to close the concerns of the Connecticut Company before its affairs became complicated and its rights were misunderstood or misrepresented. It is not alleged that any part of the matters were overlooked or forgotten. Some things may have been deemed too unimportant to attract attention. Some lands, perhaps, that at that time would not pay the expense of their reclamation. These were all matters of examination and reflection, and must have been duly considered. Those only that were unknown to the party could come before them for review, unless on a charge of mistake or fraud. Everything else was settled, finally settled. This was understood and solemnly assented to. Under no other circumstances could a final adjustment be made. This was the object of the association. In no other mode could the desired object be ascertained.

There was a peculiar fitness and propriety in this company adjusting as it did, all matters of account. Their shares were numerous, and consisted in minute pieces of property, in some instances

scarcely susceptible of division; speculation had not then got to work, and a division was not found sufficient. A general interest was felt for a rising village, and each individual was willing to contribute what he could, in reason, to its prosperity. It may be fairly presumed, that there was a disposition to give up the shreds and patches to the public, for the advancement of the general interest. This was seen in the action of the City Council, and at a future period, that of the government of the United States, in the streets and harbor to adapt them to a rising commerce. But the most persuasive action was that of declaring, that they abandoned every thing known to the association at the time. And there is reason to believe, that this was done with the view of imparting to the public such commercial and other advantages as might be useful.

The entrance of the canal into the lake, at Cleveland, and the public works on the wharves and the water line of the lake, was at first gradually extended, and afterwards, rapidly, to meet the growing necessities of commerce.

It is not essential that a public ground intended for public use, should be formally so dedicated. It is enough if the public shall take possession of the ground, using it for public purposes, and shall continue to do so for a long term of years, the public right will be presumed. This would depend upon a longer or shorter time, according to the circumstances of the case.

It is a well known principle of law, that every owner of property, whether personal or real, may abandon it. *Chalmonally* vs. *Clinton*, 2 Jac. & Walker, 59; *Kinsman* vs. *Loomis*, 11 Ohio, 479. In *Corning* vs. *Gould*, 16 Wend. 543, it is observed, that "a man shall be held to intend what necessarily results from his own acts." Consequently when property is abandoned, under such circumstances as to leave no doubt of the fact, no one who has taken possession of it can be required to relinquish it. In *Kirk* vs. *King*, 3 Barr, 436, an abandonment and non-claim for seven years was held sufficient.

Whether there be an abandonment is a question of fact to be determined by the circumstances of the case. *Ward* vs. *Ward*,

14 Eng. Com. Law and Eq., 414. And when this is done, the right is extinguished. 1 Brown's Civil and Admiralty Law, 33, 166, 237, 239, 240 and 241; 12 Ves. 264.

Where a person considered an article worthless, cast it away, he thereby divests himself of his title, and cannot complain if any other person takes possession of it. The fact of abandonment is sufficient. *Goon* vs. *Anthony*, 11 Ill., 588. *Taylor* vs. *Hampton*, 4 McCord, 96, 102, is a strong case of abandonment. *Hartford Bridge* vs. *East Hartford*, 16 Conn., 149; *Wright* vs. *Freeman*, 5 Johnson, 467; *Pickett* vs. *Dowdell*, 2 Washington Rep. 115.

Some of the leading decisions on this question are *Beckford* vs. *Wade*, 17 Ves., 98–9; *Barry* vs. *Ringord*, 1 Cox's Chan. Rep., 145; *Bergen* vs. *Bennett*, 1 Caine's Cases, 19; *Prevost* vs. *Gratz*, 6 Wheat, 481. But it is unnecessary to multiply authorities on this point. It is a doctrine too well established to be controverted.

When the town of Cleveland was laid out and surveyed, the property in dispute was dedicated by the Connecticut Land Company; the evidence is conclusive. It is proved by both Peare's and Spafford's maps, by the minutes of the survey of the town-plot; and that it was used from the earliest settlement of the town, both for a street and a landing. This was established by all the witnesses acquainted with the town at that early period. This fact of dedication is too plain for contradiction.

The use of Bath street by the public is proved beyond doubt from 1800 or 1801, down to the time when the travel along some part of it was interrupted by being entirely cut away by the action of the lake. Where there is an interruption to the enjoyment of a part of the street, and as soon as the interruption is removed, and the public right is resumed, the cause is sufficiently explained. There is no abandonment of the right, the law works no loss to the public under such circumstances. The act complained of was an abuse which the law corrects.

But it is said that this right to Bath street was abandoned by the City of Cleveland, in laying out a street 100 feet wide, and selling or leasing the land adjoining the street. This was done under ex-

press legislative authority. This, it is supposed, the legislature had the power to do. The idea is a just one, that an act done by authority of law, must be presumed to have been done for the benefit of the public.

The act of 1 May, 1800, required town plots to be recorded, under a penalty of a thousand dollars. This was done to avoid litigation. Spafford, one of the surveyors of the company, in 1801 resurveyed the streets, alleys and public grounds of the town or city. He vacated one or two alleys made by Peare, and added the land to the adjoining lots, and also opened one new alley. Beyond this he made no change in the streets, alleys and public grounds, consequently made no change in Bath street. Spafford's survey was deposited by the company's agent, with the recorder of the county for record, and was in part recorded by him. The deposition of Mr. Cafe proves that this was done, to comply with the recording act of 1800. The minutes and field notes of the survey are found on record, but the map, it is alleged, made by Spafford is not found in the records. But this is a mistake; the testimony abundantly proves, that the authority of Spafford's survey and map has been invariably recognized.

Under the circumstances, the court will presume this map to have been recorded, if the fact were not shown. The evidence that the map was made and left for record, and was used in all cases when necessary and proper, and this after the lapse of more than half a century, by which the surveys of the town have been regulated for the above period, and on which so many important interests depends, and known too so intimately by every one, is too palpable to be doubted by any one. No court can stultify itself so as to question the fact. A mere failure of a ministerial officer to record a map, is a duty which will be presumed under far less stringent circumstances than those above referred to. *Ingersoll* vs. *Harrison*, 12 Ohio, 512: *King* vs. *Harvey*, 4 Ohio, 52; *Marbury* vs. *Madison*, 1 Cranch, 161.

The grant to Lloyd does not assert that the grantors had any title to the land conveyed; it is a naked quit-claim, to what is declared in the deed to have been an unknown and doubtful right.

The grantees from Lloyd entered into possession of the premises in their own right and behalf, and not for or in behalf of the trustees of the land company, or of their cestuis que trust. The defendants are not estopped from showing and claiming that the legal title to Bath street had passed from the trustees to the county or corporation of Cleveland *in* trust to the public, before the date of their deed to Lloyd; and consequently Lloyd took no title by that conveyance. And if this be so, where is the trust relation between Lloyd and the proprietors of the reserve.

Suppose the trustees of this land, instead of selling to Lloyd, had themselves taken exclusive possession of Bath street, under claim of title, what could they do. They as the dedicators of this street could file their bill in behalf of the public to correct this abuse; but they could maintain no suit to appropriate the property to themselves on the plea that it reverted to them.

In the appropriate language of one of the counsel for the complainants, I would say, "Lloyd is not in as a purchaser from the original proprietors, those who held the beneficial interest in the land before the dedication, or those who would be entitled to it, if the dedication should be avoided. He went to trustees who had a mere naked trust in behalf of the original proprietors; and took from them a release of their trust estate. The deed which they gave would indeed pass the trust estate, it could do nothing more. Not a scintilla of beneficial interest was passed by it, and if there should be recovery in ejectment, the plaintiff would merely stand as the trustee for the original land company, to hold it as their trustee for their benefit. He has nothing but a trust. The deed itself tells the whole story of its inception and consummation."

It is said that an easement only passed by the dedication of 1796; an easement under the authority of law, remains until the law shall be changed.

It is said that a dedication, if in written terms, cannot be enlarged or altered by parol; a dedication may be made by parol, the books are full of such cases. The Pittsburgh case is an evidence of the fact, and the Cincinnati common. But where a dedication is made more than half a century, evidenced by a map and other terms of

description, which have served as guides fixing the plan of the town, designating its streets, its alleys and its lots, and which maps and written papers have, by universal consent, been referred to as establishing, for more than half a century, the demarcations of the property of the town, including the streets owned by the public, the private rights of individuals can never be doubted by any court which regards the rights of property as permanently settled.

The counsel in the defence argues, that the property in controversy was dedicated to the public or abandoned; and this it is insisted, is neither good logic nor good law. The argument, as understood, was, in the alternative, and was certainly good to show, that if the property had been dedicated or abandoned, the right was not in the complainant.

The land sought to be recovered is now very valuable, and including the alluvial formation which has been added, embraces twenty acres of soil above high water, exclusive of streets and the lake shore. It is claimed as having been dedicated as Bath street of Cleveland.

The original survey of this property was a street by Seth Peare, September 16th, 1795. By this survey and map, and the sales made by the proprietors between 1796 and 1800, it was claimed to have been dedicated as a street. This is shown by Peare's map and minutes and the record of the Connecticut Land Company. Happily the original of the minutes and the map have been preserved in the form they were when the Cleveland Land Company began to act upon them in selling lands in 1797. And to this day there has never been any other survey or field notes made by any one. Spafford's map made new traces of old lines, and placed more permanent monuments on the ground. In Peare's map a space of lot 191, and west of Water street, and south of the water's edge of the lake shore, is left unsurveyed into lots, and is marked on the map, "Bath street."

A great number of statutes from time to time was passed to establish and regulate the streets of Cleveland, and certain lots were authorized to be leased for various purposes for the public service, and this policy seemed to have been continued for a great

number of years, where such lots were not required for other purposes.

In 1841, the Council of Cleveland made an interesting report in regard to certain streets—in which they say of Bath street, that all land westerly of Water street, east of Cuyahoga and northerly of lot 191, bounded southerly by a line south 64° west, was included in Bath street. And they say, "the committee are of opinion (Anson Haysen dissenting,) that all the land lying northerly of lot 191, as subdivided, and the northerly part thereof located and extended northerly to lake Erie is included in Bath street, and is a legal highway."

In *Barclay* vs. *Howell*, 6 Peters, 512, the court say, "where a part of a strip of land adjoining a river had been used as a way, and the residue was not in a condition to be so used, without grading, &c., and the public authorities from time to time improved more and more of it, and the proprietors had made no claim for thirty years, and their agent declared when the town was laid out that it was reserved for a street: held, that the jury would be warranted in finding a dedication of the whole strip, and if so dedicated, the proprietor could not recover." And that an agent in laying out a town, returns a plan afterwards acted on by the principal, and while engaged in the work declares to the effect that a certain slip of ground was reserved for a street, are admissible to prove a dedication of the land to that use.

And in the case of *Godfrey* vs. *Alton*, 12 Ill. Rep. 38, the court say, "when a street is laid out bordering on a navigable water, it will be presumed that it was intended to be dedicated both for a highway and a landing. The navigable water is a highway; and when in contact with this, the easement of a street or highway is granted, the very location of the latter shows that it was designed for the purpose of loading and unloading freight, and landing passengers from the water. The dedication of the banks of the water unites the two easements, each of which is essential to the full enjoyment of the other."

Every one knows that the accretions on the shores of our lakes, in most cases, rapidly increase, and that they are claimed as gene-

rally belonging to the owner of the fee. This has long been the doctrine of our courts, and it applies as well to the civil as the common law. But I am not sure that the doctrine may not have been carried too far, where the accumulations have arisen, in a considerable degree, from the improvement of the ports and landing places. In regard to a general commerce, or a more limited one, where the expenditure is necessarily incurred by the public, it should exercise control for the protection and interest of commerce.

It may be necessary to inquire how far this alluvial formation may be followed, when the person bounded by it has been subjected to no expense, and when it may become inconvenient to the public? How shall the limit be fixed? It is indispensable that there should be a regulation, which should be just to all parties interested in it, and should protect the symmetry and convenience of the port. It would seem that where the lot of the occupant was bounded by a street which formed the water line of the shore, he was limited by the street, and could not claim beyond it. But where the street did not limit the boundary, the owner of the soil is obliged to protect his shore, and for this purpose he may claim the alluvial formation. So in regard to the common at New Orleans; it was enlarged by deposit, and to preserve the commerce of the city, the made land was protected to prevent the city from being cut off from the river.

Independently of the dedication of Bath street, extending to the line of the lake, in 1801, and the abandonment in 1809, after the surveys were completed and the Indian title was extinguished, the objection remains, that by the progress of time, the claim had become stale, and not a proper subject of relief in equity. In the case of *Smith* vs. *Clay*, 3 Brown's Chan. Rep. 642, it is said by Lord Camden: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced; and,

therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court."

By analogy to courts of law, chancery will apply the act of limitation. In *Haven* vs. *Annesley*, 2 Schoales & Lefroy, 638–9, the doctrine of the court is, "that in cases where the statute does not afford a direct analogy, the court will proceed according to its discretion, and this discretion will be governed by considerations of public policy, in view of the circumstances of the particular case." In a certain class of cases a court of equity, acting on its own original principles, will refuse its aid under the special circumstances of the case; and under other circumstances, will give relief in less time than required by the statute. The chancellor, under ordinary circumstances, will follow the statute. But he is not bound to do so, but will be influenced by the peculiar circumstances of each case. This doctrine is laid down in almost all the leading authorities, and especially in *Beckford* vs. *Wade*, 17 Ves. 98–9; *Barry* vs. *Ringord*, 1 Cox, 145; *Bergen* vs. *Bennett*, 1 Caine's Cases, 19; *Prevost* vs. *Gratz*, 6 Wheat. 481; *Hughes* vs. *Edwards*, 9 Wheat. 489; *Miller* vs. *McIntire*, 6 Peters, 61; *Pratt* vs. *Vattier*, 9 Peters, 405; *Bowman* vs. *Wathan*, 1 Howard, 189.

Vigilance is required in the prosecution of claims, and it has been the policy of all governments to bar claims if not prosecuted within a limited time.

More than half a century has transpired since the affairs of the Connecticut Company were said to be finally adjusted. All claims known to the company at that time were settled, in regard to debts due and the distribution of property. Great particularity, it is said, was observed in the exactness of this adjustment. The first and second generations of this large Connecticut company have gone to their account. I now speak of the shareholders of the original company. But a small portion of them can now be living. If they had left no other record of their lives and deaths, we should have looked for them among the memorials of the dead. But the papers of this suit contain some of the names of the descendants of the shareholders, if not some of those who belonged to the company originally.

It is a well established principle, that a mere quit-claim deed, without covenants of warranty, does not estop the grantor from showing that no title passed by such deed, and that, consequently, by the principle of reciprocity, it cannot estop the grantee from denying the title of the grantor at the date of the deed. The defendants, then, are not estopped from showing and claiming that the legal title to Bath street had passed to the trustees of the county or corporation of Cleveland, in trust for the public, before the date of their deed to Lloyd, and that, consequently, Lloyd took no title by that conveyance.

In their bill, the complainants charge that the conveyance by the trustees of the Connecticut Land Company, to Lloyd, of the land now in dispute, was made by a fraudulent combination, between the parties to that deed, in violation of the trust with which the land was charged, and with the design of depriving the complainants of their rights; that Lloyd had notice of the trust, and that the conveyance to him was fraudulent and void, seems to be clear.

The original shareholders never authorized the trustees to make the assignment to Lloyd, it is believed, in any form, which seems to be apparent from the deed. They incurred no responsibility, nor were they authorized to assume any. The purchaser hoped to make something out of property which resulted from the labor of others, knowing that he could lose nothing. The prospect was a prospect of gain on the one side, without loss on the other. Whether Lloyd had any interest in any original share in the company, is not known. Whether he paid anything to the trustees, is not known. The presumption, from the face of the quit-claim deed is, that if any consideration were paid, it must have been a nominal amount only.

More than twenty-seven years had transpired since the final adjustment of all claims by this company in 1809, and it would have been forgotten, or rather it would not have been brought again into view, had not the purchaser's hopes been quickened by a speculation. He is charged with fraud in procuring from the trustees the deed. Twenty-seven years the claim remained dormant, and there is no reason why its sleep should be disturbed at this late date. Its resuscitation now can impart no vitality to the claim so deliberately

abandoned in 1809, nor can it explain the dedication of Bath street in 1801; and least of all, can it excuse that staleness which now rests upon it.

Until 1842, no one took possession of the claim; but at this late period can the new claimant hope to connect it with the deliberate abandonment of 1809, when it was disclaimed by the original shareholders.

The case does not rest upon the statute of limitations, in the opinion of the court, but upon those great principles of equity, which are exercised under its own rules, by a court of chancery. It is a case not fitted for technical rules and special pleading. The association was formed on liberal principles and on enlarged plans. Immense sums of money have been expended in the construction of railroad depots and other improvements in this city, whose benefits have been extended not only through Ohio, but throughout the West.

Having deliberately considered the leading facts of the case, and the law which applies to them, I am brought to the following conclusions:

1. That in 1795, the Connecticut Land Company made a large purchase in the Western Reserve, and issued to the stockholders certificates of stock for their respective interest therein, which was divided into shares; that this stock was vested in trustees, for the purpose of partition and conveyance to purchasers; that the lands were surveyed and distributed among the shareholders.

2. That the town of Cleveland was laid out, and the plot of the town was made into streets and squares, and that Bath street was laid out as the street bordering on the lake, and included the original street on the water line; that it was dedicated, as including the land to the lake on the north.

3. The articles of the association were designed as temporary, and that the surveys having been completed, the Indian title extinguished, the shares were distributed among the stockholders in 1809, and a final settlement of their affairs was made of all matters between them, and it was agreed that there should be no other adjustment of their accounts which were then known, and only those which might afterwards be discovered, should be examined. None

such, it is understood, have been discovered, and any matters known should be considered as abandoned.

4. The claim is alleged to be a stale one, growing out of the beginning of the present century, and will not be aided in equity.

5. That the defendants have expended vast sums of money in the construction of five railroad lines and their depots, at the expense of near a million of dollars, on land made between Bath street and the lake, all of which, or nearly all of which, is now covered by railroads, depots and other buildings, for the accommodation of commerce.

6. Under these circumstances and facts, I am compelled, by a sense of duty, to say that I do not think the claim set out in the bill is sustainable in equity in favor of Lloyd or his assignees, or in favor of the Connecticut Land Company. It is therefore dismissed, with costs.

In the Supreme Judicial Court of Maine.

ELISHA PERKINS *vs.* PORTLAND, SACO AND PORTSMOUTH RAILROAD COMPANY.

1. A railroad company, in making contracts as common carriers, are not restricted to the line of transit described in their act of incorporation.
2. And if such a company, in making contracts to carry merchandise to remote places do exceed the authority, express, or implied, conferred upon them by their charter, if there is no prohibition, they cannot plead such want of authority against such a contract entered into by them.
3. And if they, having knowledge thereof, permit their agents to hold them out to the public as common carriers to places beyond the line of their own railroad, they are thereby estopped from denying the authority of such agents to make such contracts.

The facts in this case sufficiently appear in the opinion of the court, which was delivered by

DAVIS, J.—This is an action against the defendants as common carriers, for the value of a quantity of furniture received by them

for transportation. The goods were delivered to the station agent at Biddeford, who gave a receipt for them, of which the following is a copy:

OFFICE OF THE P., S. & P. R. R.
Biddeford, Me., August 27, 1858.

Received, in apparent good order, from Mrs. Sarah A. Perkins, 8 boxes, 4 chests, and 11 packages of furniture, marked *E. Perkins, Bloomington, Illinois*, which we promise to deliver to Elisha Perkins in Bloomington, in like good order.

J. S. WORKS,
Station Agent."

The furniture was carried by the defendants to Portsmouth, and sent thence to Boston, by an arrangement between them and the Eastern Railroad Company, by which the two corporations mutually conduct their business. The defendants do not appear to have had any care, nor to have exercised any control, directly, or indirectly, over the property, after it was delivered in Boston. No freight was advanced, nor any rate or sum agreed upon. It was probably understood that the defendants were to receive their usual rates to Boston. From that place the furniture was forwarded from one point to another, by the different railroad or steamboat companies on the line, each paying the previous freight, and receiving it, with their own charges, of the next company; and at the time of the loss, by collision, it was on board a steamer on Lake Michigan.

That Works, was the general agent of the defendants, to contract for the transportation of passengers and merchandise from the Biddeford station, admits of no doubt. The only question, therefore, is whether the company were bound by his special contract to deliver the goods in Bloomington, in the State of Illinois. Had the company, or had he for the company, any authority to make such contract? And if not, can the company plead such want of authority in defence?

The defendants were incorporated in 1837, with authority to construct a railroad from Portland to Portsmouth, and to exercise their corporate powers "for the transportation of persons, goods, and property of all description." And it is argued, that the corporation being the creature of the law, with no powers but those conferred

by the charter, its agents could not bind it by any contract to transport persons or property except upon its own railroad. It is contended that the company have no authority to become common carriers on other routes, and that any agreement to do so, being beyond the scope of the corporate powers, is void.

It is quite clear that a common carrier, if a natural person, may contract to carry persons or property beyond his own line, and thus make the carriers upon the connecting lines his agents. In such case he is responsible for any loss or injury upon any part of the route. 1 Parsons' Con. 687; Smith's Mer. Law, 367; Parsons' Mer. Law, 217.

Whether the same rule applies, and to the same extent, to corporations chartered as common carriers upon lines designated in the statutes by which they are created, is not so clearly settled in this country. In England the law is well established, by a series of decisions, that the same rule applies to railway companies as to natural persons. And in either case, if common carriers receive goods marked to be delivered at a place beyond the limits of their own line, they undertake, *prima facie*, to carry the goods to their destination, and are bound to do so, unless they limit their responsibility by express agreement or notice at the time the goods are received. *Muschamp* vs. *L. & P. Railway Company*, 8 Mees. & Wels. 421; *Watson* vs. *A. N. & B. Railway Company*, 3 Eng. Law & Eq., 497; *Wilson* vs. *Y. N. & B. Railway Company*, 18 Eng. Law & Eq., 557; *Crouch* vs. *L. & N. W. Railway Company*, 25 Eng. Law & Eq., 287.

In this country the rule is different. If a railway company receive goods marked for delivery at a place situated beyond the line of their own road, they are only bound, in the absence of any special contract, to transport and deliver them, according to the established usage of the business, to the carriers of the connecting line, to be forwarded to their ultimate destination. *Nutting* vs. *Conn. River Railroad Company*, 1 Gray 502; *Van Santvoord* vs. *St. John*, 6 Hill 157; *Bank* vs. *C. Trans. Company*, 18 Verm. 140; 23 Verm. 209; *Jenneson* vs. *C. & A. Railroad Company*, 4 Am. Law Reg., 234.

In all these cases it is admitted, or assumed, that a railroad com-

pany may, by *a special contract*, bind themselves to deliver merchandise at a place beyond the line of their own road, and that in such case, they are bound as common carriers for the whole route. But in none of the English cases cited, except the last one, was any question raised in regard to the power of the company under their charter. In that case this point was presented; and though the contract was to carry goods to a place beyond the realm, the company were held liable, on the ground that *they held themselves out to the public as common carriers to that place*, and were thereby estopped from denying it.

The same question was raised in this country, in the case of *Noyes* vs. *R. & R. Railroad Company*, 27 Verm. 110; and it was held that a contract to send barges to a place not on the line of their railroad, for a quantity of hay, and to transport it from that point over their road, was within the scope of the powers conferred by their charter. Redfield, C. J., the learned author of the treatise on railways, in delivering the opinion of the court, says, "it may be true, in one sense, that this is extending the duties and powers of the company beyond the strictest interpretation of the words of the charter. But the time is now past, when, as between the company and strangers, any such literal interpretation of the charter is attempted to be adhered to."

A different doctrine has been held in Connecticut. In the case of *Hood* vs. *N. Y. & N. H. Railroad Company*, 22 Conn. 502, it was held that a contract to carry a passenger from New Haven to Farmington by railroad, and thence to Collinsville by stage, was not binding on the company, on the ground that the company had no authority, by their charter, to make such a contract. But we are not aware that the doctrine has been carried to this extent in any other State.

We are satisfied that the better opinion, both upon principle and authority, is, that a railroad company may be bound, by a special contract, to carry persons or property beyond their own line. In granting the charter, all incidental powers, which are necessary to the proper and profitable exercise of those which are specially enumerated, may be presumed to have been conferred by implica-

tion. The business of common carriers between different places in our country is intimately interwoven and complicated; and it is sometimes of great public convenience, if not of absolute necessity, that several companies should combine their operations, and thus transport passengers and merchandise by a mutual arrangement, over all their lines, upon one contract, for one price. The authority to do this may be regarded as one of the incidental powers granted by the charter. In such cases each company is liable for the whole distance. *Fairchild* vs. *Slocum*, 19 Wend. 329; *F. & W. Railroad Company* vs. *Hanna*, 6 Gray 539.

And we think that a company may be bound, even without any actual arrangement with connecting lines, if, by their agents, they hold themselves out to the public as common carriers beyond the limits of their own road. *Crouch* vs. *L. & N. W. Railroad Company*, 25 Eng. Law & Eq. 287. And if such agents so represent the company to the puclic, in such a manner, or for such a length of time, that the corporators may be presumed to know it, and therefore to assent to it, the company will not be permitted to deny either their own authority, or that of their agents; and, if unless prohibited by statute, in express terms, or by implication, the company will be bound by their contracts. In the language of Redfield, C. J., in the case before cited, "if the corporators acquiesce in the extension of the business of the company, even beyond the strict limits of the charter, and strangers are thereby induced to contract upon the faith of the authority of the agents of such company, the company are not at liberty to repudiate the authority of such agents when their transactions prove disastrous."

It only remains to apply these principles to the case before us.

The plaintiff relies upon a special contract to deliver his goods in Bloomington, in the State of Illinois. The place of delivery being far beyond the line of transit under the control of the defendants, it is not sufficient for the plaintiff to prove that the contract was made by one of their subordinate agents. The authority of such agent must be proved, or some facts established which will preclude the company from denying it.

This might be done by proof of express authority, conferred upon

the agent by the corporation, or by the directors. For even if the company had no authority by their charter to contract for the transportation of goods to places so remote, and could have been enjoined or restrained from doing it, by proper proceedings, they cannot plead such want of authority against persons so contracting with them. To do this would be taking advantage of their own wrong. But the evidence in this case fails to prove that the corporation undertook to confer any special authority upon the agent to make such contracts.

If there was no express authority conferred upon the agent, it might have been implied from a mutual arrangement for the carrying business among all the carriers between the point where the goods were received and the place of delivery. Where such an arrangement actually exists, there is an implied authority on the part of the agents of each company to bind them all. But the evidence in this case is conclusive, that no such arrangement existed between the defendants and any other companies for the transportation of persons or property to any place beyond Boston.

Assuming that the agent had no actual authority, express, or implied, to make such a contract with the plaintiff, are the company estopped from setting up such a defense?

It appears in evidence that this same agent had had charge of the business of the company at the Biddeford station for several years, and that he had been accustomed to make contracts similar to the one in suit, to deliver goods at various places beyond the line of their own railroad, in this State, in Massachusetts, in Connecticut, and in Canada. The nature of these contracts, a great number of which have been proved, is such, that the manner in which the agent was doing business, and representing the company to the public, must have been known to the directors, and to many of the corporators. By permitting this to be done, and retaining the agent in office, their assent may be presumed. And though this question of fact is not entirely free from doubt, a majority of the court are of the opinion that strangers might well suppose that the agent was acting within the scope of his authority, and that the company are therefore estopped from denying it. According to the agreement of the

parties, judgment must be entered for the plaintiff for the value of the goods at the place of delivery, less the cost of transportation, he having paid no freight thereon.

In the Court of Appeals of New York.

RICHARD M. HOE ET AL., RESPONDENTS, *vs.* JESSE K. SANBORN, APPELLANT.

1. The vendor of an article of merchandise impliedly warrants that he has a title to what he assumes to sell.
2. The rule of warranty in the civil law stated, and its application discussed.
3. Where a vendor, who is a manufacturer, sells an article of his own manufacture for a purpose and a use disclosed to him, he impliedly warrants that such article is free from any latent defects growing out of the process of manufacturing, and that such article is of a fair and merchantable quality, and reasonably fit for the purpose for which it was manufactured by him.
4. Hence, where A, a vendor of saws, ordered from B, a manufacturer of saws, certain saws adapted to a circular saw-mill, which were manufactured by B and sent to A, and which upon trial by A were found to be unsound and worthless by reason of softness, and were therefore returned to B; it was held, that B could not recover in an action on a promissory note given as the consideration for the purchase.
5. The common law rule of *caveat emptor* stated and discussed, and its exceptions given.
6. The foundation on which implied warranties rest, stated and discussed; and the distinction between *actual* warranty, as matter of proof, and *implied* warranty as matter of law pointed out.
7. The case of Morley *vs.* Attenborough, 3 Ex. 500, explained.

The complaint in this case was upon a promissory note for four hundred and sixty-seven dollars and eighty-eight cents, payable to the plaintiffs, at the Washington County Bank, five months from date.

The defendant in his answer alleged, that in 1855 he purchased of the plaintiffs a quantity of circular saws, for the purchase price of which the note set forth in the complaint, was given; that at the time of the purchase, the plaintiffs "warranted said saws to be good saws, and of good quality," and averred that the saws were

"not good saws, or of good quality," and were "of no value." The reply denied the facts set up in the answer.

Upon the trial, the defendant offered to show that "at and for a long time previous to the purchase in question, the defendant was in the business of manufacturing and vending Page's circular saw mills, and had in that business had considerable dealings with the plaintiffs. That in May, 1855, he ordered of the plaintiffs the saws mentioned in the answer, for the purpose of supplying mills made and vended by him, and communicated the purpose to the plaintiffs. That upon that order, and subsequent thereto, the plaintiffs manufactured the saws in question, and forwarded the same, on defendant's order, to John Howard & Co. at Port Union, in Michigan; that the consignees tried the saw, in a circular saw mill made by defendant and sold to them; and that the saw was unsound and worthless, by reason of softness, and was returned immediately to plaintiffs, and by them attempted to be retempered; and was again forwarded to John Howard & Co., and was found to be utterly worthless, by reason of softness, and otherwise defective, and the same was then returned to defendant."

This offer was objected to, and rejected by the judge, on the ground, that the defendant, under the answer, "could not prove facts to establish an *implied* warranty; that such defence must be specially pleaded," and to this decision the defendant's counsel excepted. The judge subsequently modified this ruling, and decided to receive the evidence offered, except in so far as it was proposed to prove that the saw was manufactured by the plaintiffs *for the express use of the defendant's mills.* Evidence was therefore given, tending to show that one of the saws manufactured by the plaintiffs, and sold by them to the defendant, and for which the note in suit was given, through defective material, or want of being properly tempered, was so soft as to be entirely useless. At the conclusion of the case, the defendant's counsel insisted that the cause should be submitted to the jury upon this evidence, but the judge refused to submit to it, and directed the jury to find a verdict for the plaintiffs, thereby assuming that there could be no implied warranty as to the quality of the saws, unless they were

manufactured or sold *for a specific purpose*, for which they had proved on trial not to be suitable.

To this ruling of the judge, the counsel for the defendant excepted.

The jury found a verdict, upon which judgment was entered for the plaintiffs, and upon appeal to the general term of the Supreme Court, this judgment was affirmed. The defendant thereupon appealed to the Court of Appeals.

The opinion of the Court was delivered by

SELDEN, J.—If to sustain the defence in this case, it was necessary to show that the plaintiffs had agreed to manufacture the saws for *a specific purpose*, and that when tried one or more of them proved not to be adapted to, or useful for that purpose, then the rulings of the judge upon the trial might have been right. Such a contract would be entirely different from an ordinary sale, with a general warranty of quality, and would need to be specially stated. But, on the other hand, if upon every sale of a manufactured article by the manufacturer himself, there is an implied warranty that the article sold is free from any latent defect growing out of the process of manufacture, then the cause should have been submitted to the jury upon the evidence given. It is not necessary in pleading, where a party relies upon a mere general warranty of the quality of goods sold, to state whether the warranty is express or implied. A general averment that the vendor warranted the articles to be of a good quality, is sufficient, and proof of a warranty of either kind will support the averment. In the view I take of this case, therefore, it is only necessary to consider, whether upon a sale by a manufacturer, of articles manufactured by himself, he impliedly undertakes that such articles are of fair quality, and have no secret defect arising out of the manner in which they were manufactured.

It may not be possible to reconcile all the decisions upon the subject of implied warranties upon the sale of goods; but if we keep steadily in view the principle which lies at the basis of all such cases, we shall find that much of the apparent conflict will disappear. It is a universal doctrine, founded upon the plainest

principles of natural justice, that whenever the article sold has some latent defect, which is known to the seller, but not to the purchaser, the former is liable for this defect, if he fails to disclose his knowledge on the subject, at or before the time of the sale. In all such cases, where the knowledge of the vendor is proved by direct evidence, his responsibility rests upon the ground of fraud. But there are cases in which the probability of knowledge on the part of the vendor is so strong, that the courts will presume its existence, without proof; and in these cases, the vendor is held responsible upon an implied warranty. The only difference between these two classes of cases is, that in one the *scienter* is actually proved, in the other it is presumed.

It is obvious, that the vendor of goods would be very likely to know whether he has a title to the goods he sells. He knows the source from which such title was obtained, and has therefore means of judging of its validity, which the purchaser cannot be supposed to have. Hence, it is the doctrine, both of the civil and the common law, that every vendor impliedly warrants that he has title to what he assumes to sell. Some slight doubt has been supposed to be thrown upon this doctrine in England, by the remarks of Parke, B., in the case of *Morley* vs. *Attenborough*, 3 Exch. 500. It is, however, too well settled, both in England and in this country, to be overthrown or shaken by the *obiter dicta* of a single judge. My object is not to establish this doctrine, which admits of no doubt, but simply to show that it rests upon the foundation here suggested, viz: the presumed superior knowledge of the vendor in regard to his title. The case of *Morley* vs. *Attenborough* itself, tends, in my view, to confirm this position. It arose upon the sale, by a pawnbroker, of a harp pledged with him as security for a debt. The sale was made through auctioneers, and a general catalogue was furnished to the bidders, which "stated on the title page, that the goods for sale consisted of a collection of forfeited property." The court held that there was no implied warranty of title in that case. There was perhaps good reason why this case should be considered an exception to the general rule. The pawnbroker could not justly be presumed to have any special know-

ledge in regard to the ownership of the articles pledged. The probability was, that he received them upon the faith of the pledgor's possession alone, and the purchaser was in this respect upon an equal footing with himself.

There are other exceptions to the general rule, which have the same tendency. The case of judicial sales is one. There is no ground for presuming that the officer of the law has any peculiar knowledge on the subject, or the title to the property he exposes to sale. No doubt both the pawnbroker and the officer, if *shewn* to have knowledge which they conceal, would be liable for fraud; or if they could justly be presumed to have such knowledge, would be liable upon an implied warranty. It was expressly held in the case of *Peto* vs. *Blades*, 5 Taun., 657, that the law raises an implied promise on the part of a sheriff who sells goods taken in execution, that he does not *know*, that he is destitute of title to the goods.

A very ancient and leading case on the subject of implied warranty of title, viz: *Cross* vs. *Gardner*, Carth. 90, shows the ground of liability to be that here suggested. There the plaintiff sought to recover againt the defendant, for selling a pair of oxen as his, when they in truth belonged to another. It was objected, that the declaration neither stated that the defendant *deceitfully* sold the oxen, nor that he *knew* them to be the property of another person. But the court held the defendant liable, "because the *plaintiff* had no means of knowing to whom the property belonged, but only by the possession." This plainly implies that the *defendant* had better means of knowledge; and upon this presumption the court evidently proceeded. That this was the foundation of the decision, appears also from another report of the same case, 1 Show. 68, where the ground taken was, that "if a man having possession of goods, sell them as his own, an action lies for the *deceit*." Now deceit implies knowledge, and as no knowledge was proved, it must have been presumed.

In an older case still, viz: Dale's case, Cro. Eliz. 44, the court decided by two judges against one, that the action would not lie, because there was no allegation or proof that the defendant *knew* of the defect in his title. But, (to use the language of Cooke,) "An-

derson *contra*, for *it shall be intended*, that he that sold had knowledge whether they were his goods or not." The ground here taken by the dissenting judge, that every vendor is *presumed* to know whether he has title to the things he sells, is precisely that upon which the subsequent cases have proceeded, and one which affords a solid basis for the doctrine of implied warranty of title.

It is equally clear, that implied warranties in respect to quality, whenever they are held to arise, rest upon a presumption in each particular case, that the vendor, knew of the defect. It is easy to see, that in respect to all that class of personal chattels, which do not enter extensively into the business and trade of a people, and which do not pass rapidly from hand to hand, such as horses, cattle, furniture and the like, the vendor who in most cases would have had the article for sometime in possession and use, would be very likely to know whether it was defective; and *a presumption of knowledge* would, in such cases, as a general rule, be both reasonable and safe. On the other hand, with regard to those goods which are the subject of general traffic, and are habitually purchased, not for use, but to be sold again, no such presumption could fairly arise.

This distinction may serve to account in some degree, for the difference between the civil and the common law rule, upon the subject of *latent* defects in articles sold. The rule of the civil law, viz: *caveat venditor*, was adopted at an early period, and in reference, as it would seem, rather to those articles which are of general and ordinary use, than to such as enter extensively into the commerce of the country; while that of the common law, viz: *caveat emptor*, originating in a commercial age, and among a highly commercial people, naturally took the form best calculated to promote the freedom of trade. No doubt the common law rule is, upon the whole, wisest, and best adapted to an advanced state of society; and yet there is a large class of cases in which that of the civil law would serve to prevent many frauds. Take for instance the article of horses. Few would deny, that as to them it would be more conducive to justice, if the vendor would in all cases be held to warrant against secret defects. But as it would be impracticable to dis-

crimate among the infinite variety of articles which are the subject of sale, the common law applies the maxin *caveat emptor* as a general rule to all cases.

It has been frequently, but as I apprehend, inaccurately said, that under the civil law a warranty is implied from the payment of a "sound price" for the article sold. Although paying a "sound price" may prove that the purchaser *was not*, it does not prove that the vendor *was* cognizant of any defect. It can therefore have no tendency to show which of the two parties ought to bear the loss. Where, however, the price paid is less than the value of the article, supposing it to be sound, this shows that the purchaser was apprised of the defect, and that the parties contracted with reference to it. In such cases, therefore, no warranty arises. It is in this aspect alone that the price paid becomes of importance. But because the want of a sound price would thus prevent a warranty, it has been illogically inferred, that the payment of a sound price was the foundation of the warranty. The truth is, that the civil law raises the warranty, because it *presumes* knowledge on the part of the vendor; and the want of a "sound price" prevents a warranty, because it *proves* equal knowledge on the part of the vendee.

The theory of the civil and of the common law, in respect to these implied warranties, is entirely different. The civil law holds, that the warranty enters into and forms an integral part of the contract of sale itself; as will be seen by referring to Pothier's definition of a sale, and his statement of the obligation of the vendor to warrant against latent defects, which he deduces directly from that definition. The definition he gives, seems to be somewhat strained, for the purpose of embracing that obligation. (See Pothier on Cont. of Sale, prelim. article, and part 2, chap 1, sec. 4.) But the common law, with, as I conceive, better logic, derives the obligation from the general doctrine which holds vendors responsible for every species of deception. That this is the true source of this warranty at the common law, will be rendered apparent by reference to three early cases, two of which have been already referred to, viz: *Dale's case*, Cro. Eliz. 44; *Furnis* vs. *Leicester*, Cro. Jac. 474; and

Cross vs. *Gardner*, Carth. 90; 1 Show. 68, S. C. These cases show by what gradations a strong principle of justice overcame at length the technical rules of the common law, and forced the courts to sustain an action for a deceit, without any averment or actual proof of wilful deception.

It is possible to read even in the meagre record we have of these three cases, the mental operations of the pleaders at that remote period, in framing the respective declarations. They were all experimental cases, and probably enlisted the highest legal talent. The declaration in *Cross* vs. *Gardner*, as we know, was drawn by Mr. Justice Gould of the King's Bench. This we learn from himself, *Medina* vs. *Stoughton*, Lord Ray. 593. The object of the pleader in each case evidently was, to avoid the necessity of alleging a *scienter* of which he had no *extrinsic* proof. In Dale's case, there was no averment, direct or indirect, on the subject of knowledge, and the experiment failed, the pleader having taken too great a stride to begin with, but carrying along with him, nevertheless, one-third of the court. In *Furnis* vs. *Leicester*, the word *deceitfully*, which implied knowledge, was ventured upon, relying upon the presumption of knowledge to support it, and this experiment succeeded. In *Cross* vs. *Gardner*, another step was taken, and a colloquium and averment of possession in the plaintiff were resorted to, instead of any express or implied allegation of knowledge. In this also the pleader was successful.

These are the cases, especially the last, which established in the English courts, the doctrine of implied warranty of title; and my object in referring to them is, to sustain the position I take, that the rule was originally based upon the presumption, that a vendor *knows* whether or not he has title to the things which he sells. That this was so, is manifest from the kind of declaration used in all these cases, viz: case for a deceit. Precisely when the form of action was changed, from case to assumpsit, does not appear: but it certainly was not until after the time of Blackstone; because he says: "In contracts likewise for sales, it is constantly understood, that the seller undertakes that the commodity he sells is his own; and if it proves otherwise, an action on the case lies against him to

exact damages *for this deceit.*" 3 Black. Com. 165. It is plain, therefore, that the courts proceeded in these cases, upon the ground of presumptive knowledge on the part of the vendor of his want of title.

It has already been shown to some extent, that implied warranties as to *quality*, are based, when they exist at all, upon the same assumption. But this will further appear from some of the exceptions to the common law rule of *caveat emptor*. One of these exceptions which has been generally recognised, is, that upon the sale of provisions, which are purchased, not for the purpose of re sale, but to be consumed by the purchaser, there is an implied warranty that such provisions are sound and wholesome. There are two cases in our own courts, which show the foundation of this exception. The first is that of *Van Brachlin* vs. *Fonda*, 12 Johns. 468, which was an action to recover damages for selling a quarter of beef as "good and sound," which proved "bad and unwholesome." There was in that case, some evidence that the defendant knew the animal to be diseased, before it was slaughtered; but the court, in giving judgment, say, that "in the sale of provisions for domestic use, the vendor is *bound* to know that they are sound and wholesome, at his peril.

Although what the court here say is, that the vendor is *bound* to know the condition of what he sells, yet the subsequent case of *Moses* vs. *Mead*, 1 Denio, 378, which was more elaborately considered, shows clearly that the doctrine rests upon a *presumption* of knowledge on his part. The sale in that case was of 194 barrels of mess beef, which proved to be tainted; and the action was assuredly founded upon an implied warranty of soundness. The beef was bought not for immediate consumption, but by merchants for the purpose of being resold. Mr. Man, who argued for the defendant, did not dispute the general rule, but relied upon the fact, that the purchase was not for consumption. The pith of his argument was in this sentence; "where the sale is by wholesale, the vendor has *no more opportunity of knowing* their quality (i. e. the quality of the provisions sold) than the purchaser." In giving judgment for the defendant, the court proceeded upon this ground,

as is evident from the following language of Bronson, Ch. J. After referring with approbation to the case of *Van Bracklin* vs. *Fonda*, he says: "But there is a very plain distinction, between selling provisions for domestic use, and selling them as articles of merchandise, which the buyer does not intend to consume, but to sell again. Such sales are usually made in large quantities, and with *less of opportunity to know* the actual condition of the goods, than when they are sold by retail." The implied warranty depends, therefore, in these cases, as in all others, upon the question, whether there is reason to impute to the vendor a knowledge of the defects, if any exist.

Another exception to the general rule, which has been recognized in several cases, but with some hesitation and uncertainty, is, that a manufacturer, who sells goods of *his own manufacture*, impliedly warrants that they are free from any *latent* defect growing out of the process of manufacture. In regard to the justness of this exception, it would seem, aside from authority, scarcely possible to doubt. If the vendor can be *proved* to have had knowledge of the defect, and failed to disclose it, all agree he is liable. Is it not reasonable *to presume* that he who made a thing, which has a defect arising solely from the manner in which it is made, is cognizant of that defect? Where the vendor has manfactured the article with his own hands, the inference of knowledge would plainly, in many cases, be strong enough to charge him even in an action for fraud. But if the manufacturing is done by agents, the general principles of law would hold the principal responsible for those whom he employs. Whether the vendor, therefore, has himself manufactured the article sold, or procured it to be done by others, if honesty and fair dealing are ever to be enforced by law, a warranty should be implied. The doubts which have been expressed in one or two cases in this State, upon this subject, could, I think, never have arisen, if the courts had kept steadily in view the principles upon which implied warranty rest. This would also have prevented the confusion which pervades the early English cases on the subject of exceptions to the maxim *caveat emptor*. The rule that upon executory contracts for the delivery of some indeterminate thing at a future day,

there is an implied warranty that the article shall be of a fair quality, and merchantable; the supposed rule, that upon the sale of a thing *for a particular purpose*, there is an implied warranty that thing shall be fit and suitable for that purpose; and the like rule, that upon the sale of goods by sample, the vendor warrants that the goods shall be equal to the sample, have all been treated as exceptions to that maxim.

The first of these rules may perhaps be regarded as in some sense an exception, although the case is not one to which the maxim *caveat emptor*, could by possibility be supposed to apply. But the other two can hardly be considered exceptions at all. When a person, desirous to obtain an article for a particular purpose, but not being himself skilled in respect to such articles, applies to one professing to be acquainted with the subject, or who by his occupation holds himself out to the world as understanding it, and the latter furnishes what he alleges to be suitable; it is plainly to be inferred, that both parties understand the purchase to be made upon the judg. ment and responsibility of the seller. In view of some such case, one or more of the English judges at an early day, laid down the broad proposition, that upon the sale of goods for a specified purpose, the law raised an implied warranty, that the goods sold were suitable for that purpose. In *Bluett* vs. *Osborne*, 1 Stark., 384, Lord Ellenborough said: "A person who sells impliedly, warrants that the thing shall answer the purpose for which it is sold. " Lord Tenterdon uses similar language in *Gray* vs. *Cox*, 4 Barn. & Cres. 108, and Best, Ch. J., reiterated the doctrine in *Jones* vs. *Bright*, 5 Bing. 533.

But it is obvious, that notwithstanding the goods are sold for a particular use, if the purchaser himself understands what he wants, and selects such goods as he deems adapted to the intended use, there is no warranty. There can, therefore, be no such general rule as that referred to; but whether there is a warranty or not, must depend upon the circumstances of each particular case. This subject has been placed upon its true basis by two later English cases, viz: *Chanter* vs. *Hopkins*, 4 Mees. & Wels. 399; and *Brown* vs. *Edington*, 2 Man. & Gr., 279. In the last of these cases, Tindal,

Ch. J., says: "It appears to me to be a distinction, well founded both in reason and on authority, that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me that transaction carries with it an implied warranty, that the thing furnished shall be fit and proper for the use for which it was designed."

This extract shows, that these are not cases of implied warranty, in the ordinary sense of these terms. The question is one *of fact*, as to the actual contract between the parties. It is, on whose judgment and responsibility was the purchase really made? Implied warranties do not rest upon any supposed agreement in *fact*. They are obligations which *the law* raises upon principles, foreign to the actual contract; principles which are strictly analogous to those upon which vendors are held liable for *fraud*. It is for the sake of convenience merely, that this obligation is permitted to be enforced under the form of a contract. However refined this distinction may appear, its non-observance has led to much of the confusion to be found in the cases on this subject.

The same may be said in regard to the doctrine that an implied warranty arises upon every sale by sample, a doctrine which, with the most obvious propriety, has been limited by the recent cases in this State (unless the goods are so situated that they cannot be examined by the buyer) to those cases, where the circumstances warrant the inference, that the seller *actually undertook* that the bulk of the commodity sold corresponds with the sample. *Waring* vs. *Mason*, 18 Wend. 425; *Hayans* vs. *Stone*, 1 Seld. 73. In view of the principles settled by these cases, it is equally clear that warranties of this sort are not *implied* warranties. They are to be made out as a matter of fact, or they do not exist at all. To infer an *actual* warranty from the circumstances proved, is one thing; to impute a warranty without proof, is another and different thing; and unless we distinguish between the two, we unavoidably get into confusion.

I will refer to a single case by way of illustration: *Jones* vs. *Bright*, 5 Bing. 533, a leading case, and one frequently cited. The facts were, that the plaintiff purchased from the warehouse of the defendant, who was himself the manufacturer, copper for the sheathing of a ship. The defendant, who was informed of the purpose for which the copper was wanted, said: "I will serve you well." The copper, in consequence of some defect, lasted only four months, instead of four years, the usual time. Best, Ch. J., before whom the cause was tried, left it to the jury to determine whether the decay in the copper was occasioned by intrinsic defect or external accident; and if it arose from intrinsic defect, whether such defect was caused *by the process of manufacture.* The jury found that the decay was occasioned by some intrinsic defect, but that there was no *satisfactory evidence* as to the cause of that defect. The court held the defendant liable, but there is no little difficulty in ascertaining the precise ground upon which the decision was placed. It is evident that the Chief Justice, when he tried the cause, expected to dispose of it on the ground that the defect in the copper grew out of the process of manufacture; for he says, in his opinion upon the motion for a new trial: "I declined expressing an opinion at *nisi prius*, but I expected the jury would have found that the article was not properly manufactured, for the testimony of the scientific witness was very clear." Still, he does not seem willing to entirely abandon this ground, notwithstanding the verdict was against it, for he goes on to say: "At all events, the warranty given by them (the defendants) is not satisfied; because the jury found that there is an intrinsic defect in an article *manufactured by them.*

But the Chief Justice seems to have been driven by the verdict to seek some other ground upon which to rest the case. He argues, therefore, first, to show that the words, "I will serve you well," constitute an express warranty. He then adds: "But I wish to put the case on a broad principle. If a man sells an article, he thereby warrants that it is merchantable; that it is fit for some purpose. . . . If he sells it for a particular purpose, he thereby warrants it fit for that purpose."

Mr. Justice Burroughs seems to have taken the most sensible view of the case. He says: "I consider this as more a question *of fact* than of law. The question is, whether the contract was proved as laid? It was so proved; and after Fisher had introduced the parties, and stated the purpose for which the plaintiff wanted the copper, the defendants warranted the article by undertaking to serve the plaintiffs well."

This case has been cited indiscriminately, to prove that, upon the sale of manufactured articles by the manufacturer himself, there is an implied warranty against defects arising from the process of manufacture; that goods sold for a particular purpose are warranted fit for that purpose; and even that there is an implied warranty in all cases of sale, that the goods sold are fit for some purpose.

The case, I think, was properly decided on the ground upon which it was placed by Burrough, J. It was this case, more than any other, which has served to create in the minds of some of our judges so strong a feeling against exceptions to the maxim *caveat emptor*, that they have been disposed to reject all such exceptions without discrimination. *Wright* vs. *Hart*, 18 Wend. 449; *Hargaus* vs. *Stone*, 1 Seld. 73. But if we look at what the English courts have really *decided*, instead of what some of the judges have loosely said, we should, I think, find less occasion for deprecating their tendency in this respect towards the doctrines of the civil law, than has been supposed.

But for this hostility to *all* implied warranties as to quality, it never could have been doubted, that where one sells an article of his own manufacture, which had a defect produced by the manufacturing process itself, the seller must be presumed to have had knowledge of such defect, and must be holden, therefore, upon the most obvious principles of equity and justice, unless he informs the purchaser of the defect, to indemnify him against it. In such cases, if the price paid is entirely below that of a sound article, a presumption would no doubt arise, as under the civil law, that the purchaser was apprised of the defect.

In the present case, a portion of the alleged defect in the saws would seem to have arisen from the unsuitableness of the material

of which they were made. The rule on the subject I hold to be this: The vendor is liable in such cases for any latent defect not disclosed to the purchaser, arising from the manner in which the article was manufactured, or if he *knowingly* uses improper materials, he is liable for that also, but not for any *latent* defect in the material, which he is not shown, and cannot be presumed to have known.

The judgment should be reversed, and there should be a new trial, with costs to abide the event.

In the Court of Common Pleas—Lebanon County.

SALE OF SAMUEL SHADE'S LAND.

QUESTION OF DISTRIBUTION.

1. A judgment confessed by a husband in favor of his wife, without the intervention of a trustee, though void at law, is valid in equity. In Pennsylvania the rule of equity is adopted, and therefore such a judgment, when given *bona fide*, and for value, will be sustained. A conveyance executed, or gift consummated by the husband to the wife, during coverture, is valid in equity, and a judgment is in the nature of an executed contract.
2. *Semble;* that a wife cannot sue her husband either at law, or in equity, during coverture, or have an adverse execution against him, but his property having been sold by other creditors she will not be deprived of her lien, or stripped of her security. Therefore, where a husband borrowed his wife's money, to which he had no legal claim, and promised at the time of the loan to secure and repay it, and afterwards confessed a judgment directly to her for the amount, it will be sustained in equity, against the claims of creditors holding junior judgments, and the husband's land having been sold on other judgments, the money was awarded to the wife in discharge of her lien.

This case arose in the common pleas of Lebanon county, and the facts sufficiently appear in the opinion of the court, delivered by

PEARSON, P. J. The real estate of Samuel Shade was sold by the Sheriff of Lebanon county, and the money arising therefrom brought into court for distribution. The report of an auditor shows that a judgment for $600, entered in the name of *Elizabeth Shade* vs. *Samuel Shade*, would, if valid, be entitled to receive $74, the residue of the fund, after paying prior liens, and that the

said Elizabeth is the wife of said Samuel. It is not pretended that the judgment was fraudulently entered, or done without consideration, but it is contended that it is void for want of proper parties—that a husband cannot lawfully confess a judgment in favor of his wife, without the intervention of a trustee. The point is not decided by the auditor, but has been referred by him to the court, and his report is postponed, as we understand it, to give the other creditors an opportunity to have the judgment vacated, or stricken from the records.

If it is *void*, it may be treated as a nullity by the auditor, or we can declare it such, and order it to be expunged. If only irregular, it will stand good until reversed by the action of the proper parties.

We are satisfied that the judgment entered in this case is not supported by any act of assembly. It does not come within any of the provisions of the act of 1848, which was enacted for an entirely different purpose. The woman not standing in the situation of a feme sole trader, cannot invoke to her aid the act of 1855. Nor the act of 1856, as she was not deserted by her husband, but living with him, and the name of a next friend is not used as required by the statute. A greater difficulty arises under the 22d section of the act of the 15th of April, 1851, which was, doubtless, intended as an enabling statute, but in our opinion, if it has any effect whatever, must operate by way of restraint on the power already existing in married women to take judgments or mortgages, in the name of a trustee, against their husband. It seems to have been the opinion of the legislature that without the intervention of a trustee, "*appointed by the court*," the wife could not take a valid security against her husband for a debt justly due her, whereas the contrary is the well settled law, as we understand it. There might have been some legal difficulty in a wife bringing a suit for the recovery of her just debt against her husband, even through the intervention of a trustee, without the aid of an act of assembly; but none whatever in taking a valid security by judgment or mortgage if voluntarily given in the name of another. We, therefore, find it impossible to construe this to be an enabling statute, and cannot believe that it was intended to restrain the wife to the specific course

pointed out. We must look upon it as a mere legislative mistake in furnishing a more limited remedy to aid one who had a more full and ample one before, and shall, in examining this case, leave the act of assembly out of view entirely, as neither enlarging nor restraining the rights of femes covert.

The case does not come within the provisions of the statute, as neither the name of a private, nor legal trustee, was used by the parties; we must, therefore, determine their rights on independent principles.

By the common law husband and wife are considered one person; therefore the husband cannot give an estate to the wife, nor the wife to the husband. Co. Lit. 187 *b*. 102 *a*. So a husband cannot covenant, or contract with his wife. Idem. 112 *a*. 2 Wilson, 254; 1 Day, 221; 2 Day, 225. Neither could confess a judgment in favor of the other, for there would be no proper parties to the suit. It would be the same as a man confessing a judgment to himself. This we take to be the doctrine wherever the strict common law prevails, and the authorities to that effect are innumerable. See Story's Eq. J. § 1372 and following, and the cases there cited.

It is otherwise in equity. Nearly two hundred years since it was held that a gift by the husband to the wife, without the intervention of a trustee, is good in equity. Bunb. 205. And articles of agreement by which a wife bound herself to allow her husband so much out of her separate estate is binding in equity, without the intervention of a trustee. Bumb. 205; Story's Eq. J. § 1372; 1 P. Wms. 125, 6; 2 Vez. 7; 2 John. Ch. 537.

It was formerly supposed that the name of a trustee was indispensable in all cases of post nuptial settlements, and in all contracts between husband and wife; but that doctrine has been long exploded. Story's Eq. J. § 1380; 4 Barb. N. Y. Rep. 404; 2 Fonb. Equity, B. 1, Ch. 2, note; 2 Roper on Husband and Wife, ch. 18, 151 to 157; 9 Paige's N. Y. Ch. 363; 2 Russ. & Mylne, 197, 355.

It must be conceded that no action at law can be sustained by a wife against her husband in this State, and probably the same doctrine prevails in all others governed by the rules of the common

law. Such actions are not only invalid for want of legal parties, but come in conflict with public policy, which admits of no contest between husband and wife. 7 Casey, 396; Idem. 450. But a husband can give a note, bond, mortgage, or other obligation to his wife, which she can enforce against his legal representatives after his death, or which her representatives can enforce against him, after her death. The right of action is only suspended during coverture. 26 Alabama R. 214.

A note given by a husband to his wife for money borrowed from her, raised out of the sale of articles given over to her by him during coverture, is valid in equity, and can be recovered from his administrator after his death; 20 Ohio R. 518.

Also, where the husband gave his wife his note for money borrowed of her, and which she had received from the estate of a former husband; 10 Ohio R. 371. Or for money which otherwise belonged to her. 3 P. Wm., 337; 1 Atk., 270; 3 Paige's Ch. 452; 3 Desaussure, 158; 15 Vermont R., 537; 21 Law & Equity R., 556.

These principles of equity were fully recognized by the Supreme Court of Pennsylvania, in *Towers* vs. *Wagner*, 3 Wh., 48. In that case the wife occasionally lent money to her husband out of her separate estate, and the loan was not evidenced by any bond or note, but merely by entries in the husband's cash book, and the intention to repay was only raised by implication. Yet it was held that she could recover the amount by action against his administrator, and that the statute of limitations did not begin to run until his death, as the right of action was suspended during coverture. The courts of the State of Vermont go perhaps a step farther than our own, holding, that although there can be no suit at law between husband and wife, without the intervention of a trustee, yet they may sue each other in equity. 19 Vermont, 410. They also declare that equity will, for many purposes, consider husband and wife as distinct persons, and wherever courts of law would recognize their contracts as binding, when made with each other through the intervention of a trustee, courts of equity will hold them valid without such intervention. Equity looking to substance, and not to form. 24 Vermont, 375.

Their contracts, when made directly with each other, if done for an honest purpose, and such as equity will approve, are held binding in Maryland. 1 Md. Ch. Decisions, 523. And gifts made directly from the husband to the wife, when not done in fraud of creditors, are binding. 2 Md. Ch. Decisions, 353.

A deed made directly from a husband to his wife, if honest, is valid in equity, and will be sustained against himself, his heirs, and assigns. 28 Mississippi R., 717; 24 Id., 181; 25 Id., 166.

He may make to her a valid bill of sale of personal property. 7 Texas R., 576.

Where a husband endorsed a negotiable note over to his wife, and she received it *bona fide*, in the usual course of business, it was held in Maine, that she stood in the light of any other indorsee. 38 Maine R., 68; 34 Id., 540. And this independent of any statute.

It was held in Massachusetts, that her indorsement in her own name, of a note drawn payable to the wife, passed the legal title, her husband assenting. 10 Cushing, 291. And a deposit in bank, by the husband, in the name of the wife, is a valid gift to her of the money. 6 Cushing, 20.

If a wife is obliged to sue her husband, in order to obtain her separate estate, she must resort to a court of equity. But should she obtain possession of her separate property, she has a right to retain it, and is considered, for every purpose, both the legal and equitable owner. 16 Alabama R., 490; 3 Atk., 478; 3 Wend. 474; 1 Ves. Jr., 278; 9 Id., 486; 2 Ves. Sr., 452. In the present case the wife claims that her husband's property was converted into money without her intervention, and as the possession was cast on her, she has the right to retain it, and unless permitted so to do, her claim will be lost forever.

A post nuptial settlement by a husband, on his wife, will be sustained, where the consideration is property received from her. 16 Alabama, 489; 2 Roper on Husband and Wife, 227; Reeves' Domestic Relations, 166; 10 Ves., 146; 7 John Ch., 57. And a voluntary settlement, made by one who was not indebted at the time, was held good as against subsequent creditors. 8 Wheaton, 229.

And was also sustained as against creditors, although the husband was then insolvent, where the money settled had been received from the wife's father for the benefit of his daughter. 4 Dal. 306; in note. A post-nuptial contract between husband and wife, without the intervention of a trustee, though void at law, is good in equity, If without value, is void as to creditors. If for value received from the wife, is valid. *Duffy* vs. *The Insurance Company*, 8 W. & S., 413. It is also decided in that case, at p. 433, that a husband and wife can, in Pennsylvania, make a valid contract with each other without the intervention of a trustee. The same principle is asserted in 6 Wh., 571. And for many purposes the husband is considered a trustee for his wife, 6 S. & R. 467. The true intent of the parties will be carried into effect in equity, without regard to form, and a contract is generally valid between husband and wife, without the intervention of a trustee. 1 P. Wm. 125; 6 Id. 264; 2 Vernon, 689; Story's Eq. J. § 1373. All of these cases and principles are cited with approbation by our Supreme Court, in 8 W. & S. 433.

A reasonable gift by a husband to his wife, is sustained in equity without using the name of a trustee; and where a husband had placed a large amount of money in a chest, for the use of his wife, and always called it hers, the gift was held valid by Gibson, Ch. J. Herr's appeal, 5 W. & S. 494. This case is spoken of with high approbation by the Virginia Court of Appeals. 10 Grattan, 259. If a husband has permitted his wife to acquire property by her own labor, or by a gift from him to her, it is good against his subsequent creditors, without the intervention of a trustee. 5 Barr 154. And although at law there can be no valid contract between husband and wife, without using the name of a trustee, yet, when fair and reasonable, it will be sustained in equity. 3 Barr, 100.

A wife may purchase land without her husband's assent; and although he may afterwards dissent, the title is in her in the meantime. 1 Harris, 355. It requires an express dissent to deprive her of it. From all of the foregoing decisions and authorities we take it to be clearly settled that a husband may sell, give, mortgage, or transfer any of his property, real, personal, or mixed, directly to his

wife, without the intervention of a trustee, and that he may assign to her his choses in action, in like manner, and such acts will be held good and valid in courts of equity, and that the courts of our State, have, on that subject, fully adopted the principles of equity. Nor do we consider that the cases decided in Pennsylvania, showing that our courts will not sustain actions at law between husband and wife, militate in anywise with the equity doctrine. Those actions were attempted to be supported under the statutes relating to married women, and the acts of assembly, when fully and fairly interpreted, give no such rights as were supposed, and above all were not intended to encourage litigation between husband and wife.

I most cordially concur in all that has been said by the Supreme Court on that subject, and also as to the policy and effect of the acts generally; but there has been no intention, or attempt, to interfere with the principles of equity, as established by the earlier decisions. The whole scope and object of the various acts of assembly cited, was to enlarge the power of married women, protect their property from their husband's creditors, give themselves more full and ample authority over it, and enable them to deal more freely and safely with their husbands. For the courts so to interpret these laws as to limit the action of femes covert, and take away the authority and rights previously recognized and sustained in equity, would be to disregard and pervert the manifest intention of the legislature, by changing, enlarging and enabling, into limiting and restraining statutes. I am not prepared to say that our courts would sustain a bill in chancery by the wife against the husband, to oblige him to comply with his contract made directly with her, without the intervention of a trustee, even where the case might come within the limited chancery jurisdiction conferred by the legislature. But I consider it the settled law of this State that a gift or grant consummated and perfected by deed or delivery, will be held valid, without the name of any third person being used in the grant or conveyance. The question then arises, is a judgment an executed obligation, or is it only executory? A contract to convey, a bond, or promissory note, can only be enforced by action, and the right to sustain it is suspended during coverture. A deed of land, a gift

of a chattel, or a mortgage, take effect immediately, without further proceeding, and are treated as executed, vesting an immediate interest. A judgment, which is considered the end of the law, gives, not a right of action, but as we conceive, an immediate vested interest, and must be held to take effect presently. It is true that such a gift may not be available generally, without the aid of an execution, which our courts would scarcely permit to be issued by the wife against the husband during coverture, if resisted by him, such acts of hostility being against legal policy; with his consent it could be lawfully awarded. After his death it would go against his legal representatives. Where the wife can avail herself of her judgment, without adverse process against her husband, I am not aware of any technical rule which stands between her and her right; therefore when a sale of the land, on which the wife's judgment is a lien, is made by another creditor, no good reason can be presented which will deprive her of her money. Should the claim not be allowed, it might be lost forever, as the land would be discharged of the lien, and her security gone; although on the death of the husband she would have a right of action even on a mere personal obligation. On this motion to strike off the judgment, for want of proper parties, it is fair to presume that it was honestly and *bona fide* entered, for value, and as the application does not come from the husband, that it still has his sanction and approbation. It can only be expunged from the record because it is void, not for irregularity, of which none but the parties can complain. Whilst the gift, grant, or confession of judgment by a feme covert is void, whether in favor of her husband or another, for want of power in her, yet as the husband is under no legal disability the objection to his act is purely technical.

We are of the opinion that this judgment, if entered in good faith, would be sustained in equity; and therefore should not be set aside in Pennsylvania, where the rights of the parties are regulated and governed by equity principles.

We must next consider whether the judgment was entered for *value*, for if merely *voluntary*, it is void as to creditors. The evidence shows that Mrs. Shade had a separate estate coming from her